No. 79-335

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

SHELL OIL COMPANY, AMOCO PRODUCTION COMPANY, and NORTHERN MICHIGAN EXPLORATION COMPANY,
Petitioners,

v.

WEST MICHIGAN ENVIRONMENTAL ACTION COUNCIL, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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Shell Oil Company, Amoco Production Company, and Northern Michigan Exploration Company, who appeared as appellees and as intervening-defendants below, petition this Court for a writ of certiorari to review a decision entered by the Supreme Court of Michigan on February 20, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of Michigan is reported at 405 Mich. 741, 275 N.W.2d 538, and ap-

pears in the Appendix to this petition. (A. 1a-22a). Petitioners' motion for rehearing appears in the Appendix (A. 23a-41a), as does the order of the Supreme Court of Michigan denying that motion. (A. 43a). Neither the opinion of the Ingham Circuit Court, announced at the close of the case, nor its final judgment is officially reported. They are reproduced in the Appendix at A. 45a-55a and A. 56a, respectively.

JURISDICTION

The decision of the Supreme Court of Michigan was entered on February 20, 1979. Petitioners' timely motion for rehearing was denied by that court on May 7, 1979. On July 18, 1979, Mr. Justice White granted petitioners an extension of time until September 4, 1979, to file their petition for certiorari in this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether, consistent with the Due Process Clause of the Fourteenth Amendment, an appellate court may enter final judgment for plaintiffs on a portion of their complaint that had been dismissed by the trial court at the close of the plaintiffs' case, without remanding proceedings to afford defendants the opportunity to introduce evidence responsive to the previously dismissed allegations of the complaint?

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1968, the Michigan Department of Natural Resources (DNR) sold to petitioners and others oil and gas leases of state-owned lands, some of which were located in the Pigeon River Country State Forest ("Forest"). (A. 2a-3a). In 1975, DNR prepared an environmental impact statement (EIS) concerning a management plan for oil and gas development in the Forest. The EIS discussed the possibility of allowing such development in or immediately adjacent to a six by eight mile area of the Forest, known as "Unit I," where some oil wells were already located, so as to preserve the other three units in their relatively undeveloped state for wildlife and for hunting and other recreational uses. (A. 3a).[1]

The management plan imposed numerous other limitations upon future oil and gas operations in this part of the Forest. For example, it provided that, upon the completion of initial exploratory drilling, wells would

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[1] There are presently five oil wells in Unit I. (EIS p. 53). It is traversed by roads. (*Id.* p. 61). All proposed "wilderness or natural areas" in the Forest are located outside Unit I. (*Id.* at 59).

be shut-in and no efforts would be undertaken to develop or produce oil and gas until DNR published an additional EIS which would assess the impacts of development and production in the Forest—*e.g.*, the installation of more permanent facilities for extracting oil and gas, the construction of roads to service the production facilities, the laying of pipelines, etc.[2]

On June 11, 1976, after negotiations with DNR and the Michigan Natural Resources Commission (NRC), petitioners entered into a "Stipulation Consent Order" accepting the restrictions contained in the management plan, as well as agreeing to other limitations upon their operations. (A. 3a).

This litigation commenced on September 17, 1976, when the West Michigan Environmental Action Council and assorted other organizations filed a complaint in the Circuit Court for Ingham County Michigan against the NRC and the Director of DNR alleging various violations of Michigan environmental and oil and gas laws which they claimed invalidated the consent order. (A. 4a). Petitioners soon moved to intervene as defendants, and on October 22, 1976, their motion was granted.

At no point prior to trial, did plaintiffs make any attempt to amend their complaint to attack the subsequent action of the Michigan Supervisor of Wells, who, on August 24, 1977, granted petitioners permits to drill

[2] EIS pp. 44-46. Additionally, the plan required, among other things, "unitized" operations to reduce by 75% the number of drilling rigs (*Id.* pp. 44, 56), measures to screen necessary facilities from roads and trails (*Id.* p. 44), installation of more quiet electric motors (*Id.*), and close State supervision of roadway and similar construction (*Id.* pp. 44-45).

ten exploratory wells. Although plaintiffs' counsel represented that he would file a supplemental complaint attacking the drilling permits themselves, which he characterized as "a new matter," so as to squarely "allege that oil development in the [Forest] will in and of itself violate" the applicable law (Tr. Oct. 10, 1977, p. 70), plaintiffs chose instead to go to trial solely on the basis of their original complaint.

That complaint contained six counts. (R. 2-27).[3] However, Counts II through VI were dismissed at or before the close of the presentation of plaintiffs' evidence at trial and were not in any respect referred to by the Supreme Court of Michigan in the opinion here under review. In so striking these five counts, the trial court relied principally upon the argument that the challenged consent order, in and of itself, would not lead to any oil or gas exploration or developmental activities which could impact the environment. (*See e.g.*, R. 1005-06, 1046, 1061).[4]

The trial court similarly dismissed all but one of the operative paragraphs of Count I of the plaintiffs' complaint. These dismissed paragraphs stated a "substantive" cause of action under the Michigan Environ-

[3] As used herein, "R." refers to the appendix filed by plaintiffs in the Michigan Supreme Court.

[4] As the trial court held in striking Count III of the complaint charging violations of the Michigan Oil and Gas Act, Mich. Stat. Ann. § 13.139:

> "The court has stated that it [the consent order] is not a guarantee to oil and gas drilling, any more than the leases are guarantees [that] oil and gas operations may go forward. It stands in approximately the same position as the leases which the state granted . . . ." (R. 1061).

mental Protection Act (MEPA), Mich. Stat. Ann. § 14.528(201). They charged that the consent order would lead to "pollution, impairment, or destruction" of natural resources in violation of the NRC's purported duties to prevent such impacts upon the environment. Of particular significance here in the light of the subsequent decision of the Michigan Supreme Court, the trial court struck in its entirety paragraph 15 of the complaint which alleged, in pertinent part, that

> "the order is likely to lead to impairment of wildlife in the PRCSF including elk, bobcat, and bear. Development in Unit I will require pipelines through the Black River Swamp which will or is likely to impair the ecosystem of the swamp and the Black River." (R. 10-11).

The only operative provision of Count I, beyond those setting forth allegations of background facts and the prayer for relief associated with that count, left standing at the close of the plaintiffs' case was paragraph 16, which alleged a "procedural" MEPA case:

> "Prior to the entry of the order, the Commission had a duty to make findings regarding the likelihood of impairment to natural resources. MEPA mandates that these facts 'shall be determined.' The order was entered without findings, and was therefore entered unlawfully." (R. 11) (citations omitted).[5]

[5] The trial court indicated that its refusal to strike the prayer for relief associated with Count I was based upon the fact that it had refused to strike paragraph 16, so that plaintiffs were entitled to appropriate relief upon a showing that the consent order "was improperly entered into by virtue of the findings surrounding it." (R. 1079).

Apparently recognizing that the trial court's dismissal of paragraph 15 and all the other allegations of the complaint concerning the purported impact of drilling upon wildlife and other aspects of the environment read the substantive environmental issues out of the case, plaintiffs, finally, attempted to amend their complaint so as to attack the drilling permits themselves. (R. 1081). At this point, however, the trial court ruled that it was too late for plaintiffs to so change their theory of the case, since defendants had "cross-examined witnesses [and] prepared their case on the basis" of the original complaint, which challenged only the consent order. (R. 1082). Accordingly, the court denied plaintiffs' motion to amend the complaint, since they had "not met the standards set forth in the rule, ha[d] not convinced the Court that prejudice would not result." (R. 1083).

Given these trial court rulings at the close of plaintiffs' case, the state defendants and the petitioners limited their evidence to testimony responsive to the procedural claim that the State had proceeded without the "findings" required by Michigan law. Neither made any effort to develop the affirmative defenses available under Michigan law in response to a substantive case—*e.g.,* that there are no feasible and prudent alternatives to the proposed action and that the action is consistent with the public health, safety and welfare. (Mich. Stat. Ann. § 14.528(203)(1)). Indeed, the trial court's ruling at the close of plaintiffs' case vindicated the view, consistently taken by the defense, that it was unnecessary to develop any affirmative defenses in this case because plaintiffs, having not placed the drilling permits in issue, had not properly pled and therefore

could not prove a substantive cause of action under MEPA. (R. 810-12).[6]

At the conclusion of the case, the trial court held that "essentially, this suit boils down to the Court's consideration of paragraph 16 of the complaint." (A. 45a). Holding that the State's obligations under the Michigan environmental laws to make "findings," as alleged in paragraph 16, were satisfied by the publication of the EIS (A. 46a), the court rejected plaintiffs' contentions under paragraph 16.

The trial court next observed that defendants had consistently argued that plaintiffs had failed properly to present for the court's consideration "any adverse impact" that would result from drilling operations because of their refusal to amend the complaint to attack the drilling permits themselves. (A. 47a). Nevertheless, the trial court in its oral opinion delivered at the close of the case went on to speak to the impact of oil and gas development on natural resources, including elk (A. 52a-53a), pursuant to the following rationale:

> "In any event, to prevent return of the matter for findings of fact in the event of an appeal, in the alternative view of the Plaintiffs, *although the Court finds not well pled and with no attempt to amend,* but in consideration of the Court's perhaps too liberal policy in giving the Plaintiffs leeway, the Court will speak to the allegations of

[6] The State put on only two witnesses, both of whom had prepared reports on the management plan underlying the consent order (R. 1091-93), as well as the EIS for that plan (R. 1095, 1123, 1134), which the State claimed constituted the "findings" required by applicable law. Petitioners put on only one witness, whose consulting firm had prepared a report on the effects that an oil spill would have upon ground water, which had been submitted to the NRC as, in effect, a supplement to the EIS. (R. 1112-15).

> pollution, impairment and destruction surrounding the air and water." (A. 48a, emphasis added).

Concluding that plaintiffs' evidence failed with respect to these substantive issues, the trial court entered final judgment against them. (A. 55a).

Plaintiffs lodged an immediate appeal with the Michigan Court of Appeals, but then asked the Michigan Supreme Court to bypass the intermediate appellate court and grant direct review of the trial court's judgment. The Michigan Supreme Court granted plaintiffs' request for a direct appeal and also entered an order enjoining petitioners' operations pending that appeal. (A. 4a).

On February 20, 1979, the Michigan Supreme Court rendered the decision which is the subject of this petition. The Court conceded that "the record below is unclear as to what conduct of defendants is alleged as being 'likely to pollute, impair or destroy the air, water or other natural resources . . .' " (A. 4a). It attributed this "confusion" to "plaintiffs' failure to amend their September, 1976 complaint to specifically attack the validity of the permits issued in August, 1977, despite their offer to do so at an October, 1977 pretrial conference." (A. 5a). The Michigan Supreme Court thus admitted that:

> "as a result, there was uncertainty in the proceedings below as to whether the validity of the permits was ever properly put in issue before the court." (A. 5a).[7]

[7] This statement by the Michigan Supreme Court must be contrasted with the specific rulings of the trial court that plaintiffs had not placed the permits in issue and that to have granted their motion to do so, after the close of all their evidence, would have resulted in prejudice to the defendants. (*See* p. 7, *supra*).

However, asserting that "all parties presented evidence on the likely effect of the drilling of the ten wells" and that "the effects of these permits were comprehensively treated at the trial level" (A. 5a), which assertions could have rested only upon the state defendants' and petitioners' evidence responsive to plaintiffs' procedural case, the court concluded that "plaintiffs' allegation that the consent order is likely to lead to pollution, impairment or destruction of the natural resources" of the Forest was fully litigated below. (A. 5a). In so referring to "plaintiffs' allegation" as to the effects of the consent order, the Michigan Supreme Court did not acknowledge that all such substantive allegations, including the specific charge that elk would be adversely affected, had been removed from the case before defendants put on their evidence, nor did it indicate that the petitioners had for this reason not developed the affirmative defenses available to rebut such substantive allegations.

On this basis, the court below reversed the trial court's decision and directed entry of a "permanent injunction prohibiting the drilling of the ten exploratory wells pursuant to permits issued on August 24, 1977." (A. 14a). In so ruling, the Michigan Court did not even refer to plaintiffs' procedural claim. Instead, it rested decision solely on the facts that "plaintiffs have demonstrated a likelihood of impairment or destruction of natural resources, specifically of elk, as a result of the proposed drilling of ten exploratory wells," and that defendants had not developed affirmative defenses to rebut this charge. (A. 9a).

Three of the seven Justices of the Michigan Supreme Court dissented. Recognizing that the trial judge ruled that the "effects [of drilling] were *not* in issue" (A. 21a, emphasis in original), they would have

> "remand[ed] to the circuit court for further proceedings because the defendants may have been denied an opportunity to present evidence on the issue of likely impairment or destruction from the drilling of ten test wells by a belief, shared by the judge, that the effect of test drilling was not in issue." (A. 22a).

Petitioners applied to the Michigan Supreme Court for rehearing, arguing that the Court's refusal to remand the case for hearing deprived them of the opportunity to respond to plaintiffs' evidence with respect to elk and wildlife, in violation of the Due Process Clauses of both the Federal and Michigan Constitutions. (A. 24a, 26a-27a). The Michigan Supreme Court denied the petition for rehearing without an opinion. (A. 43a).

REASONS FOR GRANTING THE WRIT

The Michigan Supreme Court has rendered a decision contradicting numerous opinions of this Court under the Due Process Clause which guarantee defendants adequate notice of and subsequent opportunity to defend against the claims of plaintiffs.[8] Be-

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[8] Since the federal question in this case did not arise until the Michigan Supreme Court's opinion, petitioners raised the question presented here at their earliest opportunity. *See* Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 677-78 (1930); Saunders v. Shaw, 244 U.S. 317, 320 (1917).

cause this case involves core Due Process rights,[9] whose disregard by the Michigan Supreme Court has brought to a standstill a significant energy project, the issue raised in this petition make it a most apt vehicle for the exercise of this Court's *certiorari* jurisdiction.

This Court has repeatedly required, even in cases involving informal administrative action, that notice be adequate "to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U.S. 1, 14 (1978) (condemning as inadequate the notice provided by a regulated utility to one of its customers on the ground that it may not have apprised him of available procedures for challenging a disputed bill). *See also Matthews* v. *Eldridge,* 424 U.S. 319, 325 n.4 (1976); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

Petitioners had no such notice here. At the time they were required to put on their defense, the sole issue in the case was a procedural question under the Michigan environmental laws concerning the adequacy of the "findings" made by the state agencies in connection with their approval of the 1976 consent order. Petitioners' evidence was tailored to meet this claim; it was not addressed to the affirmative defenses which are pertinent only to a "substantive" claim.[10] On appeal, however, the Michigan Supreme Court ignored the procedural issue, rendered decision upon substantive environmental grounds, and ruled against petitioners because they had not developed their affirmative defenses.

[9] Boddie v. Connecticut, 401 U.S. 371, 375, 378 (1971) (the Fifth and Fourteenth Amendments reflect "the centrality of the concept of due process in the operation of [the judicial] system," guaranteeing "notice and opportunity for hearing appropriate to the nature of the case.")

[10] *See* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1300-01 (8th Cir. 1976), *cert. denied,* 430 U.S. 922 (1977), clarifying the distinction between procedural and substantive issues under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321. *See generally,* Leventhal, *Environmental Decisionmaking and the Role of Courts,* 122 U.Pa. L. Rev. 509 (1974).

Thus, the deprivation of due process which occurred here is more serious than in *Craft* and other similar cases. Petitioners were not merely put in the posture of guessing whether substantive environmental issues were still in the case when they put on their defense; they had a direct ruling by the trial judge striking the elk-impact and all other substantive issues. With this decision of the trial judge, which adopted the view of the case asserted by the state defendants and petitioners consistently throughout the litigation, petitioners obviously had no reason to introduce evidence as to elk, nor did they have any occasion to plead or develop the affirmative defenses to dispute a substantive case.[11]

In entering judgment for the plaintiffs under these circumstances, the Michigan Supreme Court directly

[11] The defenses thus not developed were substantial. It is estimated that the oil and gas located in Unit I of the Forest could heat nearly one million homes for one year (EIS p. 41), that 1400 jobs in other parts of Michigan would be created by allowing development there (*Id.*), and that, at 1975 prices (which are less than half of current levels (*Id.* p. 71)), the State would receive between $57 and $113 million in royalties (*Id.* p. 41). Moreover, even at 1975 prices, production of Unit I oil and gas would be worth nearly $1 billion (*Id.* p. 72) and would thus represent a substantial contribution toward lessening the Nation's dependence on foreign imports.

contradicted the rule of this Court in *Saunders* v. *Shaw*, 244 U.S. 317 (1917). In that case, Mr. Justice Holmes, writing for a unanimous Court, dealt with a situation quite like the present one. Plaintiff filed suit in a state court of Louisiana to enjoin the collection of a drainage tax, offering evidence to show that his land would receive no benefit from the drainage project. Defendant objected to this evidence, and it was excluded as inadmissible. 244 U.S. at 318. Ultimately, however, the Louisiana Supreme Court upheld plaintiff's claim that his land could not be benefited by the project and granted an injunction against the tax assessment.[12]

This Court reversed, holding that "when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible . . . ." 244 U.S. at 319. The Court took this action because it could not otherwise "be sure that the defendant's rights are protected without giving him a chance to put his evidence in." (*Id.*).

The vitality of the rule of *Saunders* v. *Shaw* has been recognized in subsequent decisions of this Court.[13] Moreover, in other relevant contexts, this Court has time and again struck down notice in state judicial proceedings which was too vague to inform a defendant of the precise nature of the charges or actions that

[12] Two Justices of the Louisiana Supreme Court, like the minority below here, dissented from its action, arguing that the case should be remanded to the trial court. 244 U.S. at 319.

[13] *See e.g.*, Hamling v. United States, 418 U.S. 87, 110, 149-50 (1974), in which all nine members of the Court referred to the rule of *Saunders* v. *Shaw* without questioning its validity.

might be taken against him. *Taylor* v. *Hayes*, 418 U.S. 488 (1974); *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974); *In re Ruffalo*, 390 U.S. 544, 550-51 (1968).

The reason for this Court's consistent adherence to the rule of *Saunders* v. *Shaw* and its insistence in other analogous contexts upon adequate notice is perhaps best summed up in Mr. Justice Frankfurter's concurring opinion in *Anti-Facist Committee* v. *McGrath*, 341 U.S. 123, 171-72 (1951):

> "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

Here, petitioners were denied that opportunity. Having successfully moved to strike those substantive aspects of the plaintiffs' complaint that pertained to elk and other wildlife and having limited plaintiffs' claims to a procedural attack upon the alleged failure of the Michigan agencies to make the findings required by Michigan law, petitioners were fully justified in believing that, should the trial court's rulings on their motions ultimately be reversed on appeal, they would be entitled to a remand where they would have the opportunity to present their evidence. *See United States* v. *Gypsum Co.*, 333 U.S. 364, 401-02 & n.20 (1948); *White* v. *Rimrock Tidelands, Inc.*, 414 F.2d 1336, 1340 (5th Cir. 1969); *Gulbenkian* v. *Gulbenkian*, 147 F.2d 173, 177 (2d Cir. 1945), all of which reflect the unanimous view that, when an appellate court reverses the grant of a defendant's motion at the close of the plaintiff's case to strike the complaint, "the action must be remanded for further proceedings

to allow the defendant to present his case." 414 F.2d at 1340.[14]

CONCLUSION

The constitutional principles violated by the Michigan Supreme Court are so well established that petitioners request the Court to grant the petition, reverse the decision below, and remand the case for a full hearing in the trial court. In the alternative, petitioners request that this Court grant the petition and set the case for plenary consideration.

Respectfully submitted,

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[14] Michigan General Court Rule 504.2, the procedural basis for defendants' motion to dismiss plaintiffs' complaint at the close of its case, is similar in all relevant respects to FRCP 41(b) under which the cases cited above were decided.

APPENDIX.

APPENDIX A

WEST MICHIGAN ENVIRONMENTAL ACTION COUNCIL, INC., Pigeon River Country Association, Northland Sportsman's Club, Detroit Audubon Society, Inc., Michigan Council of Trout Unlimited, Inc., Michigan Student Environmental Foundation, Inc., Michigan Nature Association, Inc., East Michigan Environmental Action Council, Inc., Michigan Lakes and Streams Association, Inc., Sierra Club, Inc., Plaintiffs-Appellants,

v.

NATURAL RESOURCES COMMISSION of the State of Michigan, and Howard Tanner, as Director of the Department of Natural Resources of Michigan, Defendants-Appellees,

and

Shell Oil Company, a Delaware Corporation, Amoco Production Company, a Delaware Corporation, and Northern Michigan Exploration Company, a Michigan Corporation, Intervening Defendants-Appellees.

Docket No. 60800,

Calendar No. 6.

Supreme Court of Michigan.

Argued May 3, 1978.

Decided Feb. 20, 1979.

• • • • • • • • • • •

Roger L. Conner, Grand Rapids, for plaintiffs-appellants.

Frank J. Kelly, Atty. Gen., Robert A. Derengoski, Sol. Gen., Stewart H. Freeman, Thomas F. Schimpf, Asst.

Attys. Gen., Lansing, for defendants-appellees Natural Resources Commission of the State of Michigan and Howard Tanner, Director.

Foster, Swift, Collins & Coey, P.C., Lansing, by Richard B. Foster, Webb A. Smith, Terence V. Lynam, Lansing, for intervening defendants-appellees.

Moody, Justice.

The issue is whether plaintiffs have made a prima facie showing under the Michigan environmental protection act, M.C.L. § 691.1201 *et seq.*; M.S.A. § 14.528(201) *et seq.*, that the drilling of ten exploratory wells in the Pigeon River Country State Forest will constitute a likely impairment or destruction of natural resources. We hold:

I) that the question of the likely effects of the ten exploratory wells was properly before the trial court;

II) that the trial judge erred in deferring to the Department of Natural Resources conclusions as to the likelihood of impairment of natural resources rather than exercising his own totally independent judgment;

III) that the evidence adduced at trial conclusively demonstrates that the drilling of the ten exploratory wells for which permits have been granted will likely result in an impairment or destruction of elk. Plaintiffs have thereby made out a prima facie case under M.C.L. § 691.1203(1); M.S.A. § 14.528(203)(1).

We reverse and remand to the trial court for entry of a permanent injunction prohibiting the drilling of the ten exploratory wells pursuant to permits issued on August 24, 1977.

Facts

In 1968 the Department of Natural Resources (DNR) sold oil and gas leases covering 546,196.89 acres of state-owned land, including 57,669 acres in what is now known

as the Pigeon River Country [sic] State Forest (Pigeon River Forest or Forest). Since that time, 19 oil and gas wells have been drilled in the Forest, five of which have been and are now producing wells.

Over a period of years, various plans to provide for controlled oil and gas development in the Forest were considered by the DNR. A management plan (the "limited development plan"), allowing oil and gas development in the southern one-third of the Forest while prohibiting development in the northern two-thirds, was submitted by the Director of the DNR, Howard Tanner, to the Natural Resources Commission (NRC). The DNR was asked to prepare an Environmental Impact Statement with respect to this management plan. In December, 1975, the Environmental Impact Statement (EIS) was completed.

The DNR then commenced negotiations with oil companies holding leases in the Forest in an attempt to have them agree to the development scheme set forth in the proposed management plan. On June 11, 1976 the NRC entered into an agreement entitled "Stipulation Consent Order" with Shell Oil Company, Amoco Production Company, and Northern Michigan Exploration Company. The consent order adopted the limited development plan allowing oil and gas development in the southern one-third of the Forest, subject to certain enumerated conditions and restrictions.[1]

The West Michigan Environmental Action Council (WMEAC) and the Pigeon River Country Association (PRCA) filed a motion to intervene in *In the Matter of Hydrocarbon Development in the Pigeon River Country*

[1] Similar consent orders were later negotiated with Sun Oil Company, Michigan Consolidated Gas Company, Getty Oil Company, and Chevron Oil Company, such that the only oil and gas lease in the Forest not covered by a consent order was that for Corwith 1-22, the subject of litigation in *Michigan Oil Co. v. Natural Resources Commission*, 406 Mich. 1, 276 N.W.2d 141 (1979).

State Forest and moved for a hearing to be held on the June 11, 1976 consent order. On August 13, 1976 the NRC rejected this motion on the basis that it was premature and should properly be granted only when permits were applied for.

On June 12, 1977 Shell Oil Company applied for permits to drill ten exploratory wells in the limited development region. On August 24, 1977 the Supervisor of Wells granted these permits.

On September 17, 1976 plaintiffs filed the complaint in this action under the Michigan environmental protection act claiming that the consent order was entered into unlawfully and was likely to lead to the impairment of wildlife in the Forest. Plaintiffs sought an order restraining the state from issuing any permits to drill for oil and/or gas in the Forest or from implementing the June 11, 1976 consent order.

On December 5, 1977 the court rendered its final decision against plaintiffs and denied a motion for a stay and/or injunctive order pending appeal.

On December 7, 1977 an appeal was filed in the Court of Appeals. The Court of Appeals denied plaintiffs' motion for an injunctive order pending appeal on December 15, 1977. The following day plaintiffs filed an application for leave to appeal with this Court and requested an injunction pending that appeal. On December 22, 1977 this Court granted the injunctive request. 402 Mich. 836 (1977). Later, on January 5, 1978 we granted the motion for an appeal prior to decision by the Court of Appeals. 402 Mich. 845 (1978).

I

The record below is unclear as to what conduct of defendants is alleged as being "likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein." M.C.L. § 691.1203(1); M.S.A. § 14.528

(203)(1). Specifically, it is uncertain whether the action of the Supervisor of Wells in granting ten permits on August 24, 1977 to drill exploratory wells for oil and gas was a part of such conduct.

Part of the confusion resulted from plaintiffs' failure to amend their September, 1976 complaint to specifically attack the validity of the permits issued in August, 1977, despite their offer to do so at an October, 1977 pretrial conference. As a result, there was uncertainty in the proceedings below as to whether the validity of the permits was ever properly put in issue before the court.

Nonetheless, all parties presented evidence on the likely effect of the drilling of the ten wells. Furthermore, the trial court chose to address the issue of the likelihood of pollution, impairment or destruction from the drilling activities contemplated by the ten permits.

We conclude that the issuance of the permits to drill ten exploratory wells was properly before the circuit court as conduct alleged to be likely to pollute, impair and destroy the air, water or other natural resources or the public trust therein. The effects of these permits were comprehensively treated at the trial level, both by the parties and by the circuit judge. Further, the consent order, which the trial court recognized was designed to be a "legally enforceable" document, stated that "[a]s many as ten test wells may be drilled for verification of seismic information. Specific drilling locations for these wells shall be determined by the oil companies and the director in consultation with the Public Service Commission."

Therefore, plaintiffs' allegation that the consent order is likely to lead to pollution, impairment or destruction of the natural resources of the Pigeon River Country State Forest can fairly be said to include within it an allegation that the issuance of permits for drilling test wells will have such result, the issuance of these permits being an inevitable consequence of the adoption of the consent order.

II

Plaintiffs allege that the trial court deferred to the DNR's conclusion that no pollution, impairment or destruction of the air, water or other natural resources or the public trust therein was likely to result from the contemplated drilling. Plaintiffs claim that such deference constituted error by the trial court and that the court had a responsibility to independently determine whether such pollution, impairment or destruction would occur. We agree that the trial court so erred.

While we understand the trial judge's reluctance to substitute his judgment for that of an agency with experience and expertise, the Michigan environmental protection act requires independent, *de novo* determinations by the courts.

The act declares that "[p]rinciples of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts shall apply to actions brought under this act". M.C.L. § 691.1203(1); M.S.A. § 14.528(203)(1). Furthermore, the Legislature specifically addressed the relationship between suits brought under the environmental protection act and administrative proceedings:

> "(2) If administrative, licensing or other proceedings are required or available to determine the legality of the defendant's conduct, the court may remit the parties to such proceedings which proceedings shall be conducted in accordance with and subject to the provisions of Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.313 of the Compiled Laws of 1948. In so remitting the court may grant temporary equitable relief where necessary for the protection of the air, water and other natural resources or the public trust therein from pollution, impairment or destruction. In so remitting the court *shall retain jurisdiction of the action pending completion thereof for*

> *the purpose of determining whether adequate protection from pollution, impairment or destruction has been afforded.*
>
> "(3) Upon completion of such proceedings, the court *shall adjudicate the impact* of the defendant's conduct on the air, water or other natural resources and on the public trust therein in accordance with this act. In such adjudication the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this act.
>
> "(4) Where, as to any administrative, licensing or other proceeding, judicial review thereof is available, *notwithstanding the provisions to the contrary of Act No. 306 of the Public Acts of 1969, pertaining to judicial review, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.*" (Emphasis supplied.) M.C.L. § 691.1204; M.S.A. § 14.528(204).

Additionally, § 5 of the act states in relevant part:

> "(2) In any such administrative, licensing or other proceedings, *and in any judicial review thereof,* any alleged pollution, impairment or destruction of the air, water or other natural resources or the public trust therein, *shall be determined, and no conduct shall be authorized or approved which does, or is likely to have such effect* so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare." (Emphasis supplied.) M.C.L. § 691.1205; M.S.A. § 14.528(205).

The above sections provide that the court in which suit is filed retains original jurisdiction of the matter, even if it chooses to remit parties to administrative proceedings. Moreover, the court has a responsibility to "adjudicate"

and "determine" whether "adequate protection from pollution, impairment or destruction has been afforded". Courts can discharge their responsibility to make such determinations only if they make independent, *de novo* judgments. In fact, M.C.L. § 691.1204(4); M.S.A. § 14.528(204)(4), specifically indicates that the usual standards for review of administrative actions under the Administrative Procedures Act, M.C.L. § 24.201 *et seq.;* M.S.A. § 3.560(101) *et seq.*, are inapplicable once an environmental protection act case has been filed in a circuit court. The environmental protection act would not accomplish its purpose if the courts were to exempt administrative agencies from the strict scrutiny which the protection of the environment demands.

Shortly after the environmental protection act was passed, its chief legislative sponsor stated that "[u]nder the new statute, courts may inquire directly into the merits of environmental controversies, rather than concern themselves merely with reforming procedures or with invalidating arbitrary or capricious conduct." [2]

This Court has previously acknowledged:

> "In the final analysis the very efficacy of the EPA will turn on how well circuit court judges meet their responsibility for giving vitality and meaning to the act through detailed findings of fact." *Ray v. Mason County Drain Commissioner,* 393 Mich. 294, 307-308, 24 N.W.2d 883, 889 (1975).

Therefore, we conclude that the trial judge erred in failing to exercise his own totally independent judgment. We find, however, no need to order remand because we conclude that a judgment in favor of plaintiffs is required on the record presented.

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[2] Press release, ***Michigan Passes Landmark Environmental Law,*** July 2, 1970, State Representative Thomas Anderson.

III

Defendants in this case have not sought to raise any affirmative defenses under M.C.L. § 691.1203(1); M.S.A. § 14.528(203)(1), but, rather, have rested their case on a denial that plaintiffs have made a prima facie showing that the conduct of defendants has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein. We find that plaintiffs have demonstrated a likelihood of impairment or destruction of natural resources, specifically of elk, as a result of the proposed drilling of ten exploratory wells.

There is little, if any, dispute that the drilling of the exploratory wells will have some adverse impact upon some wildlife, particularly elk, bobcat and bear. The trial court found that "[t]here appears to be no question that adverse impacts will be visited upon particularly the elk, and to some lesser extent, bear and bobcat. • • • It is clear that an adverse impairment of the herd is likely for some unknown period to some unknown degree." [3]

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[3] The record supports this finding.

Gary Boushelle, the DNR wildlife biologist who approved the ten sites, agreed that there would be a "severe adverse environmental effect for some wildlife species". E. Ford Kellum, a wildlife biologist and a former employee of the DNR, stated that Unit 1 of the Forest, in which the exploratory drilling is to occur, has "unique, almost endangered species, elk, bear and bobcat, osprey and a bald eagle, of which this was the center of where it looked like if they were going to survive the human race it's gonna' be here." Mr. Kellum testified that his experience at Charlton 1-4 and other wells led him to the observation that once drilling occurred in an elk habitat the elk no longer returned there.

Mr. Ned Caveney, the area forester in charge of the Forest, stated that it has been necessary to restrict snowmobiles in the Forest, even though each snowmobile represented only a temporary intrusion, in order "to improve and increase favorable elk habitat, and • • • to provide seclusion for wildlife".

Mr. Robert Strong, the district wildlife biologist in Gaylord, in charge of overseeing development of management plans for elk,

Perhaps the single most revealing piece of evidence is the Environmental Impact Statement for Potential Hydro-

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bear and bobcat, noted that elk need large blocks of land since they normally range over 10 to 25 miles. He noted that the area in which the proposed drilling is to take place presently provides excellent habitat for elk, is within their range, and that they are commonly seen there. He stated that each well site would adversely affect elk up to two to three miles away.

Mr Strong also stated his opinion that the effect on wildlife did not differ "whether there was 10 or 40" wells drilled, and concluded that a logical environment defense line for elk would rule out any further well drilling in that Forest.

Mr. Strong further testified that there has been a steady decline in bobcat population due to loss of habitat and increased development, and that the drilling of wells would have an adverse effect on bear and bobcat although he could not qualify within what radius each site would affect those animals.

Nelson Johnson, Jr., the DNR regional wildlife biologist for the northern half of the Lower Peninsula, agreed with Mr. Strong's statement that elk would be adversely affected within a two-to three-mile radius around each drilling site. Mr. Johnson stated that the sites proposed for drilling offered good habitat for elk, and had previously noted the effects of a reduction in available habitat in his testimony in *Michigan Oil Co. v. Natural Resources Commission, supra.* In that case he had stated:

> "If they drill a well, there are not going to be a lot of elk, and bobcats and bear drop dead. But because of their aversion to this type of thing—especially the elk—and the history of how this animal has become almost extinct over almost 80 to 95 percent of its former range, indicates it is a sensitive animal. Their pattern of use of the area is going to be disrupted, and we believe and think that our research which we have carried on in our state in the past—this elk herd is going to be less able to make use of the range and therefore, since there is a limited place where they can go, sooner or later it is going to result in decrease of their population."

Dr. Donald Inman, of the Office of Environmental Review of the DNR, stated in a letter that the results of drilling in the Forest would be "that those species of wildlife for which people value the Forest and those which are susceptible to man-made disturbances will, in all probability, be reduced in number".

carbon Development in the Pigeon River Country State Forest, prepared by the DNR. Some of this statement concerns the impact of production of oil and is not relevant for present purposes. However, many of the EIS's conclusions directly apply to the effects of exploratory drilling.

Testimony before the trial court indicated that six of the ten proposed sites were not adjacent to any road, requiring that roads be built to such sites. The EIS cites studies in Montana, by the Intermountain Forestry and Range Experiment Station, 1973, which concluded that "[e]lk avoid roads even when there is no traffic". The EIS also observed that "[w]hether the elk will return to their former range following completion of the last seismic survey work is unknown".

Seismic survey work precedes exploratory drilling and it is designed to determine whether oil might be in an area; exploratory wells are then drilled to determine if production efforts are warranted. Seismic survey work occurs over a less prolonged period than exploratory drilling and yet, apparently, may result in an extended absence of the elk to the extent that it is uncertain whether or not they will return.

Exploratory drilling obviously exacerbates this problem and, in fact, the EIS notes, "with the possibility of drilling and production development following the survey, an early return by the elk is doubtful."

The EIS observes that "[t]he most pressing need of Michigan elk is to protect their range against further human intrusion for purposes other than timber or wildlife management," and that the last remaining sanctuaries against the disturbance of oil and gas development have now disappeared. It concludes:

> "Additional disturbances from hydrocarbon development, new roads, initial drilling activities, and the presence of facility sites will significantly reduce elk

> numbers in the proposed area. It is likely that much of the existing herd will not remain in revised Unit 1, but will spread out to the northern areas of the PRCSF and to private lands. However, private lands also may be impacted by hydrocarbon development. ***An unknown number will not survive since habitat is finite.*** A viable population *may* survive, however, *if* intensive management efforts are established in priority areas in the northern PRCSF and *if* poaching can be substantially decreased throughout the elk range." (Emphasis supplied.)

The EIS also found that bobcats are "expected to retreat in the face of hydrocarbon development. The history of this species indicates a high degree of incompatibility with the works of man". With respect to bears, the EIS states "[b]ears have been pressed into wild areas of diminishing size by the increasing pressures of land development and other human disturbances throughout much of the northern Lower Peninsula. • • • It is expected that the one to two percent of the land which will be intensively developed as sites will have less impact on bears than will the development of service roads with resultant multiplied human activities and increased human contact."

Some quantification of the adverse impact of exploratory drilling on the elk can be gained from comparing the EIS's Matrix for Proposed Hydrocarbon Development in the Southern Portion of the Forest, with Dr. Inman's testimony. Dr. Inman, who participated in the development of the EIS, testified that a slow recovery time is considered to be 40 to 50 years or more, a short recovery time less than 20 years, and a great recovery time is about 100 years or more.

The Environmental Impact Matrix predicts that elk will be adversely affected by the development of roads and pads. These are associated with even exploratory drilling.

The Environmental Impact Matrix defines a significant adverse impact as "a change in the element that is impacted from its present status to a status that may take a *long time for recovery,* at least during the duration of the project." Applying Dr. Inman's definitions of what constitutes a slow recovery time to the matrix predictions, it would appear that elk would avoid the impacted areas for 40 to 50 years.

As noted above, the trial court conceded that the exploratory drilling would have an adverse effect upon wildlife. However, the trial court determined that this adverse impact did not constitute impairment or destruction of a natural resource because such adverse impacts are "commonly the result of management decisions. Improving

> deer habitat by cutting trees to allow the sun to shine on the forest floor for the purpose of new growth, it certainly has an adverse impact upon the animals, birds, so forth, using the trees. Eradicating the entire fish population in a lake or stream to destroy unwanted trash species in order to plant more acceptable fish certainly has an adverse impact on the fish killed but is an acceptable management technique. • • • These animals, along with the trees that will be cut, harvested, or otherwise removed, are the innocent victims of the discovery of oil in their forest domain".

This determination reveals a fundamental misconception. If nature is allowed to pursue its own course, the growth and expansion of some species will inevitably result in the diminution and possible extinction of others. Faced with a situation where an adverse impact will occur naturally unless some action is taken, it is a management decision to determine whether such natural processes should proceed or whether, through human intervention, the adverse impact should artificially be shifted to other species. The choice is not whether an adverse impact will occur, but, rather, upon what.

If oil or gas development does not take place, the oil and gas will not be adversely impacted. On the other hand, if such development does take place, wildlife is adversely affected. Thus, the choice is whether or not *any* adverse impact on natural resources will be allowed.

We recognize that virtually all human activities can be found to adversely impact natural resources in some way or other. The real question before us is when does such impact rise to the level of impairment or destruction?

The DNR's environmental impact statement recognizes that "[e]lk are *unique* to this area of Michigan" and that the herd is "the *only* sizable wild herd east of the Mississippi River. Several attempts to introduce elk elsewhere in Michigan have been unsuccessful."

It is estimated that the herd's population, which numbered in excess of 1500 in 1963, now probably lies between 170 and 180. Expert testimony has established that the Pigeon River Country State Forest, particularly unit 1 in which the exploratory drilling is to take place, provides excellent habitat for elk and that the elk frequent this area. Furthermore, it is clear from the record that available habitat is shrinking. The result of a further shrinkage of this habitat by the intrusion of exploratory drilling and its concomitant developments is that "an unknown number [of elk] will not survive".

In light of the limited number of the elk, the unique nature and location of this herd, and the apparently serious and lasting, though unquantifiable, damage that will result to the herd from the drilling of the ten exploratory wells, we conclude that defendants' conduct constitutes an impairment or destruction of a natural resource.

Accordingly, we reverse and remand to the trial court for entry of a permanent injunction prohibiting the drilling of the ten exploratory wells pursuant to permits issued on August 24, 1977.

FITZGERALD, RYAN and WILLIAMS, J.J., concur.

LEVIN, Justice.

The issue is whether plaintiffs made a prima facie showing under the environmental protection act [1] that the drilling of ten exploratory wells in Unit 1 of the Pigeon River Country State Forest will constitute a likely impairment or destruction of natural resources.

We would vacate the judgment of the trial court and remand to it for further proceedings, retaining jurisdiction.

I

In 1968 the Department of Natural Resources (DNR) sold oil and gas leases covering 546,196.89 acres of state-owned land including 57,669 acres in what is now known as the Pigeon River Country State Forest (PRCSF). Since that time, 19 oil and gas wells have been drilled in the PRCSF, 5 of which are producing wells.

Over a period of years, various plans to control oil and gas development in the PRCSF were considered by the DNR.[2] A management plan, allowing oil and gas development in the southern one-third of the PRCSF while prohibiting development in the northern two-thirds, was submitted by the Director of the DNR to the Natural Resources Commission (NRC). The DNR was asked to prepare an Environmental Impact Statement (EIS) with respect to the management plan, which was completed in December, 1975.

The DNR then negotiated with oil companies holding leases in the PRCSF in an effort to have them agree to the management plan. On June 11, 1976 the NRC entered

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[1] M.C.L. § 691.1201 *et seq.*; M.S.A. § 14.528(201) *et seq.*

[2] In 1973, the DNR published a "Concept of Management" for the PRCSF. In January, 1975, a specific proposal for unitized development of the oil and gas in the PRCSF was presented to the DNR. A revised proposal was presented in October, 1975 which was published for public comment and review.

into a "Stipulation Consent Order," intended to be legally binding, with Shell Oil Company, Amoco Production Company, and Northern Michigan Exploration Company. The consent order adopted the management plan allowing oil and gas development in the southern one-third of the PRCSF, subject to certain conditions and restrictions.[3]

Plaintiffs West Michigan EnvironmentalAction Council and the Pigeon River Country Association moved to intervene in administrative proceedings concerning the consent order and sought a hearing. On August 13, 1976 the NRC rejected this motion on the basis that it was premature and could properly be granted only when permits were applied for.

On June 12, 1977 Shell Oil Company applied for permits to drill ten exploratory wells in the limited development region and on August 24, 1977 the Supervisor of Wells granted these permits.

Before the permits were applied for, on September 17, 1976, plaintiffs commenced this action under the environmental protection act claiming that the consent order was not lawfully entered into and was likely to lead to impairment of wildlife in the PRCSF. They sought an order restraining the state from issuing any permits to drill for oil or gas in the PRCSF or in any other way implementing the consent order.

On December 5, 1977 the court found against plaintiffs and denied a motion for a stay pending appeal.

We granted leave to appeal prior to decision by the Court of Appeals and injunctive relief pending appeal.

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[3] Similar consent orders were later negotiated with Sun Oil Company, Michigan Consolidated Gas Company, Getty Oil Company, and Chevron Oil Company. However, Corwith 1-22, the subject of *Michigan Oil Co. v. Natural Resources Commission*, 406 Mich. 1, 276 N.W.2d 141 (1979), was not covered by a consent order.

II

Plaintiffs contend that the judge deferred to the DNR's conclusion that no pollution, impairment or destruction of the air, water or other natural resources or the public trust therein was likely to result from the contemplated drilling. The judge's comments in this regard are unclear, but are subject to that construction.

We agree with the plaintiffs that such deference would constitute error. A judge has a responsibility to determine independently whether pollution, impairment or destruction is likely to occur. While we can understand a judge's reluctance to substitute his judgment for an agency's informed decision, a stance generally appropriate when reviewing decisions of an administrative agency, the environmental protection act provides for a separate, independent determination by a court.

Not only does the act declare that "[p]rinciples of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts shall apply to actions brought under this act",[4] the Legislature specifically addressed the relationship between actions brought under the environmental protection act and administrative proceedings.[5] The usual standards for review of administrative actions under the Administrative Procedures Act[6] are not applicable.

As recently stated in *Superior Public Rights, Inc. v. Department of Natural Resources*, 6 Env.L.Rptr. 20435, 20437 (Ingham Circuit Court [1976], where this issue was raised:

> "[T]o rule that the reviewing court is bound by the administrative fact finding would be but to destroy one

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[4] M.C.L. § 691.1203(1); M.S.A. § 14.528(203)(1).

[5] M.C.L. §§ 691.1204, 691.1205; M.S.A. §§ 14.528(204), 14.528(205).

[6] M.C.L. § 24.201 *et seq.*; M.S.A. § 3.560(101) *et seq.*

> of the central thrusts and purposes of [MEPA]—to watchdog the controlling governing agencies themselves in order to guarantee that they do not by inadvertence become the captives of the very entities they are seeking to control and/or fail to recognize, due to ingrained myopia, inertia and bureaucratic complacence, the very environmental dangers they were established to prevent." (Digest.)

III

Defendants have not sought to raise affirmative defenses under the environmental protection act,[7] but have rested on a denial that plaintiffs made a prima facie showing that the conduct of defendants is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein.

There is little dispute that drilling the exploratory wells will have adverse impact upon some wildlife, particularly elk, bobcat and bear. The judge found that "[t]here appears to be no question that adverse impacts will be visited upon particularly the elk, and to some lesser extent, bear and bobcat. * * * It is clear that an adverse impairment of the herd is likely for some unknown period to some unknown degree." He determined, however, that this adverse impact did not constitute impairment or destruction of a natural resource because such adverse impacts are

> "commonly the result of management decision. Improving deer habitat by cutting trees to allow the sun to shine on the forest floor for the purpose of new growth, it certainly has an adverse impact upon the animals, birds, so forth, using the trees. Eradicating the entire fish population in a lake or stream to destroy unwanted trash species in order to plant more acceptable fish certainly has an adverse impact on the

[7] M.C.L. § 691.1203(1); M.S.A. § 14.528(203)(1).

> fish killed but is an acceptable management technique. * * * These animals, along with the trees that will be cut, harvested, or otherwise removed, are the innocent victims of the discovery of oil in their forest domain."

He particularly relied on the testimony of Dr. Inman, who had expressed the opinion that, although the drilling would have an adverse impact on certain species of animals, it would not have an adverse impact on the overall environment of the forest.

The examples of management technique offered by the judge are inapposite. If nature is allowed to take its own course, the growth and expansion of some species may result in the diminution and possible extinction of others. Faced with a situation where an adverse impact may occur naturally unless some action is taken, it is a management decision to determine whether such natural processes should proceed or whether, through human intervention, the adverse impact should be shifted to other species. That choice, however, is not *whether* an adverse impact on a natural resource will occur at all but what species will bear the burden of it.

The Environmental Impact Statement states that "[e]lk are *unique* to this area of Michigan" and that the herd is "the *only* sizable wild herd east of the Mississippi River. Several attempts to introduce elk elsewhere in Michigan have been unsuccessful." (Emphasis supplied.)

It is estimated that the herd's population, which numbered in excess of 1500 in 1963, is now probably between 170 and 180. Testimony established that the PRCSF, particularly Unit I in which the exploratory drilling is to take place, provides a favorable habitat for elk and that elk have frequented the area. Further, the available habitat is shrinking. It appears that the result of a further shrinkage by the intrusion of exploratory drilling is that some elk will not survive.

In light of the limited number of elk and the unique nature and location of this herd, there is evidence that defendants' conduct may impair or destroy a natural resource.

We refrain, however, from deciding whether plaintiffs made a prima facie case that defendants' conduct is likely to impair or destroy a natural resource within the meaning of the environmental protection act for reasons stated in part IV, *infra*.

IV

The complaint alleged: "The [consent] order will or is likely to lead to pollution, impairment and/or destruction in the natural resources of the [Pigeon River Country State Forest]."

At the trial, it was unclear whether the conduct so alleged as "likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein"[8] was or should be treated as limited to the effects of the consent order or whether it included the effects of issuing ten permits to drill exploratory wells for oil and gas.

Eleven months after the complaint was filed, in August, 1977, the Supervisor of Wells, pursuant to the consent order, granted ten permits to drill exploratory wells. Plaintiffs then sought an injunction restraining the oil companies from exercising their rights under the permits. The circuit court denied a preliminary injunction. In September, 1977 plaintiffs appealed to the Court of Appeals which denied relief because no drilling activity could occur under the permits between then and November 30 and plaintiffs therefore would suffer no irreparable harm by denial of injunctive relief. Noting that there had not yet been a trial on the merits, the Court of Appeals ordered: "This cause

[8] M.C.L. § 691.1203(1); M.S.A. § 14.528(203)(1).

be, and the same hereby is remanded for immediate trial which shall commence on or before October 10, 1977 and proceed to conclusion on an expedited schedule." The Court of Appeals, thus, apparently expected that the validity of the ten drilling permits would be contested at the trial on plaintiffs' original complaint.

Plaintiffs did not amend their complaint to specifically attack the validity of the permits. The judge indicated that he would allow such an amendment, but none was filed. As a result, there was uncertainty at the trial whether the propriety of issuing the permits themselves was properly in issue.

Plaintiffs presented evidence on and argued the likely effect of drilling ten wells. The judge, in his findings of fact, ultimately ruled that such effects were *not* in issue. He said, however, that although the effects of drilling the ten wells were "not well pled and with no attempt to amend, * * * in consideration of the court's perhaps too liberal policy in giving the plaintiffs leeway," he had addressed the issue of the likelihood of pollution, impairment or destruction from the drilling activities contemplated by the ten permits.

The consent order stated that "[a]s many as ten test wells may be drilled for verification of seismic information. Specific drilling locations for these wells shall be determined by the oil companies and the director in consultation with the Public Service Commission."

While the question of production was left unresolved by the consent order,[9] some test wells were to be drilled.

[9] The consent agreement states with respect to production of oil and gas: "It is further agreed by the parties that before production of oil and gas takes place in the limited development region, the oil companies ***shall submit to the Director for his approval a development plan and an environmental assessment.***" (Emphasis supplied.)

It was only their location that was to be determined by the Director of the DNR.

Plaintiffs' allegation that the consent order is likely to lead to pollution, impairment or destruction of the natural resources of the PRCSF can fairly be said to include within it the effect of issuing permits for drilling test wells, the issuance of the permits being an inevitable consequence of the adoption and implementation of the consent order.

We would, however, remand to the circuit court for further proceedings because the defendants may have been denied an opportunity to present evidence on the issue of likely impairment or destruction from the drilling of ten test wells by a belief, shared by the judge, that the effect of test drilling was not in issue.

We would vacate the judgment of the trial court and remand to it for further proceedings, and retain jurisdiction.

KAVANAGH, C.J., and COLEMAN, J., concur.

APPENDIX B

STATE OF MICHIGAN IN THE SUPREME COURT

WEST MICHIGAN ENVIRONMENTAL ACTION COUNCIL, INC., PIGEON RIVER COUNTRY ASSOCIATION, NORTHLAND SPORTSMAN'S CLUB, DETROIT AUDUBON SOCIETY, INC., MICHIGAN COUNCIL OF TROUT UNLIMITED, INC., MICHIGAN STUDENT ENVIRONMENTAL FOUNDATION INC., EAST MICHIGAN ENVIRONMENTAL ACTION COUNCIL, INC., MICHIGAN LAKES AND STREAMS ASSOCIATION, INC., SIERRA CLUB, INC.,
Plaintiffs-Appellants,

vs

NATURAL RESOURCES COMMISSION OF THE STATE OF MICHIGAN, and HOWARD TANNER as Director of the Department of Natural Resources of Michigan,
Defendants-Appellees, and
SHELL OIL COMPANY, a Delaware corporation, AMOCO PRODUCTION COMPANY, a Delaware corporation, and NORTHERN MICHIGAN EXPLORATION COMPANY, a Michigan corporation,
Intervening Defendants/Appellees.

Ingham County Circuit Court Case No. 76-19335-CE

Court of Appeals No. 77-4777

Supreme Court Case No. 60800

MOTION FOR REHEARING

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Dated: March 12, 1979

APPLICATION FOR REHEARING

The Intervening Defendants/Appellees Shell Oil Company, Amoco Production Company, and Northern Michigan Exploration Company urge rehearing of this matter and reconsideration of this Court's opinion for the following reasons:

I

It is repugnant to the fundamental concepts of fairness and the Federal and State Constitutional requirements of due process of law for this Court to reverse and render based upon the record before it, where the Trial Court dismissed from the case at the close of Plaintiffs' proofs the very issues upon which this Court not only reverses but renders a final decision of the case, thereby precluding applicants from presenting proofs—denying them even an opportunity to be heard.

II

Even assuming, *arguendo*, that the Trial Court erred in its finding that Plaintiffs had failed to establish a prima facie case with regard to impairment to natural resources, Defendants/Appellees are entitled to an opportunity to present evidence. This Court's holding deprives Defendants/Appellees of that fundamental right.

III

The Court erred by its holding that the validity of the permits issued on August 24, 1977, was properly before the Trial Court.

IV

Even if the Trial Court erred in holding that the validity of the permits was not properly before that Court, Defendants/Appellees are entitled to an opportunity to defend in light of this Court's holding thereon. This Court's failure to remand deprives Defendants/Appellees of this fundamental right.

V

The Court's interpretation of MEPA requiring the application of a de novo standard of review where Plaintiffs seek review of an administrative action is contrary to the express provisions of the Constitution of the State of Michigan.

Applicants realize that essentially what is being requested of the Court here is a reconsideration of its own actions as a denial of due process of law. In that sense, we view this as a very unusual case; for it is what this Court will do by *its* Order remanding for permanent injunction rather than any error committed by the Trial Court that will result in denial of due process to applicants. We cannot believe that this Court would knowingly give such short shrift to Intervening Defendants/Appellees' procedural and property rights, and we are confident that, with an increased awareness of the manner in which the Trial Court defined the issues, the Court will reconsider its Order to reverse and render.

ARGUMENT

In its opinion of February 20, 1979, the Court held unanimously that the Michigan Environmental Protection Act requires a de novo review on the part of the Trial Court. Having found that the Trial Court in this matter applied the wrong standard of review, the majority determined to make findings of its own without remand entirely on the record before it.

Clearly, in undertaking to review the matter, the majority was required by the Court's own holding to apply a de novo standard of review. It is inconceivable to us that the Court could undertake such a review without a full reading and consideration of the entire record in this matter. Nonetheless, we cannot believe that the majority did so; for if they had, they would have considered the facts that: (1) The Trial Court, *at the close of Plaintiffs' proofs*, dismissed that part of the Complaint which alleged impairment to the elk, bobcat, bear, and other natural resources (A1013; Tr 3022)—the very issues upon which the majority grounded its findings. (2) *At the close of Plaintiffs' proofs*, the Trial Court specifically and expressly ruled that the validity of the drilling permits of August 24, 1977, was not before the Court and *not at issue* (A1058-1059; Tr 3141-3142).

Justices Levin, Coleman, and Kavanagh stated that, "the Defendants may have been denied an opportunity to present evidence on the issue of likely impairment or destruction from the drilling of the ten test wells by a belief, shared by the judge, that the effect of test drilling was not an issue." (pp 7-8) Intervening Defendants/Appellees did not rely on a *belief* that such was the case, we relied upon a specific *ruling* by the Court to that effect *prior* to the presentation of our defense.

Even if the Court were to hold that the Trial Court erred in dismissing those portions of the Complaint relative to impairment to elk, etc., fundamental principles of due process of law would require at the very least that the Court remand the case to the Trial Court to give Defendants an

opportunity to present their defenses in light of that ruling. The Court's indication of an intent to enter an order remanding to the Circuit Court for entry of a permanent injunction clearly deprives Intervening Defendants/Appellees of their rights to due process of law guaranteed by the Constitutions of the United States of America and the State of Michigan.

Few would argue that a procedural nightmare has been created in this case. What is most frightening about it, however, is the way the highest Court in the State of Michigan has chosen to deal with the problem. While admitting that at least "[p]art of the confusion resulted from Plaintiffs' failure to amend their September, 1976, Complaint . . . despite their offer to do so at an October, 1977, Pretrial Conference" and "[a]s a result, there was uncertainty in the proceedings below as to whether the validity of the permits was ever properly put in issue before the Court" (p 5), the majority of this Court would visit the sins of the Plaintiffs upon the Defendants by effectively amending the Complaint retroactively.

Finally, based upon the pleadings, Plaintiffs sought review of an administrative action. No cause of action was ever stated against Intervening Defendants. We contend that, in an appeal from an administrative action, seeking review thereof, requirement of a de novo standard of review is contrary to the provisions of Article VI § 28 of the Constitution of the State of Michigan.

I. THE COURT ERRED AS A MATTER OF LAW WHEN IT REVERSED AND RENDERED BASED UPON THE RECORD WITHOUT ALLOWING DEFENDANTS AN OPPORTUNITY TO PRESENT EVIDENCE RELEVANT TO THE VERY ISSUES UPON WHICH THE COURT'S OPINION IS BASED DESPITE THE FACTS THAT:

A. At The Close of Planitiffs' Proofs, The Trial Court Specifically Ruled That The Validity Of The Drilling

Permits Issued By The Supervisor Of Wells On August 24, 1977, Was Not At Issue Or Properly Before The Court.

The Court's holding that the validity of the permits issued on August 24, 1977, was properly before the Trial Court is contradicted by the record. As this Court is well aware, the only Complaint filed in this matter, and never amended, was filed in September, 1976. At that time, no applications for permits were even in existence. At the time of trial, Defendants/Appellees called to the Trial Court's attention that the validity of such permits had not been placed at issue by the Plaintiff. Further, it was indicated that Defendants asserted a right to have any issues sought to be brought before the Court framed by way of pleadings so that Defendants could properly respond and defend in the case. (Tr 32; 62)

As the record clearly shows, Plaintiffs never made good their offer (Tr 71) to amend the Complaint and properly place before the Court the validity of the ten permits issued in August, 1977. Consistently, throughout the trial proceedings, Intervening Defendants/Appellees objected to any evidence relevant to the validity of the issuance of the permits. The Trial Court, recognizing that this was a nonjury trial, allowed certain testimony and evidence to be adduced despite questionable relevance, indicating that the Court could exercise its discretion with regard to any matters that were subsequently determined to be irrelevant to any issue properly before the Court.

Following the closing of Plaintiffs' proofs, but before the presentation of proofs by Defendants, the Court, ruling on Motions (A1052-1054; Tr 3135-3138) brought by Defendants, held:

> [n]ow it's clear that we are not here on an appeal of any action taken by the Supervisor of Wells in his capacity as Supervisor of Wells. I don't understand that we have before us a judicial determination of the

> procedure engaged in by the state and the oil wells (sic) in procuring the leases. The Court allowed the leases to come into evidence to assist and aid certain witnesses in the presentation of their evidence. Leases were necessary for Mr. Westlund, for example, to describe and for the cross-examiner to cross-examine him on his description of the procedures that were described in the leases.
>
> MR. SMITH: Excuse me, your Honor, I think you mean the permits.
>
> THE COURT: I mean the permits. Correct. I misspoke myself. (Tr 3141 and 3142)

The Court went on to state at Tr 3143, "So I don't understand that we are here on any contest of the activities surrounding the granting of permits pursuant to the Oil and Gas Act."[1]

It is, therefore, clear that at the time Defendants were called upon to present proofs the Trial Court had ruled that the validity of the permits was not an issue before it. Even if the Trial Court were wrong in so ruling, it is incredible that this Court can so easily state that Defendants had an opportunity and did in fact present evidence on that issue.[2]

Intervening Defendants offered the testimony of one witness and one witness only. That witness was Dean Gregg of Dames & Moore, who testified as to a hydrological study that had been conducted in the area of the forest known as Unit I. His references to the drill sites for purposes of identifying geographical locations were not relevant at all to the validity of the permits themselves. In fact, other than Mr. Gregg's involvement with the hydrological study that was considered by the Department of Natural Resources,

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[1] This ruling became the law of the case and was never appealed by Appellants. Appellants are now bound by that ruling and this Court is precluded from considering it *sua sponte*.

[2] Without a single citation in support thereof.

Mr. Gregg had nothing whatever to do with the applications for the permits.

In any event, even if Intervening Defendants/Appellees did present evidence which could be construed as relevant to the validity of the permits, such cannot constitute anything but improperly admitted irrelevant evidence based on the express ruling of the Trial Court.

Had the Trial Court ruled otherwise, our entire defense would have been handled differently. Let there be no doubt in the Court's mind that we are ready and able to offer evidence that goes to the very heart of the factual questions on which the Court has rendered a decision. Evidence exists and would have been presented which would entitle Intervening Defendants/Appellees to a favorable ruling.

B. At The Close Of Plaintiffs' Proofs, The Trial Court Specifically Ruled That Those Portions Of The Complaint Alleging Pollution, Impairment, Or Destruction To Elk, Bobcat, Bear, And Other Resources Were Dismissed And No Longer At Issue.

At the conclusion of Plaintiffs' proofs, Defendants/Appellees moved the Trial Court for dismissal of the Complaint based upon GCR 1963, 504.2. As indicated in Intervening Defendants/Appellees' Counterstatement of Facts (pp 9-10), the Trial Court dismissed, in their entirety, Counts II through V[3] of the Complaint before Defendants were called upon to proceed with presentation of proofs. In addition, the Trial Court dismissed all but a few Paragraphs of Count I of the Complaint, the Count containing the only allegations purported to constitute a cause of action under the Michigan Environmental Protection Act. In fact, as pointed out in footnote 9, page 10 of Intervening Defendants/Appellees' Brief, the only substantive Paragraph left in Count I was Paragraph 16, which asserted that the

[3] Count VI had already been dismissed pursuant to a similar motion brought earlier in the trial (see our Brief p 24).

Natural Resources Commission had failed to make findings prior to the entry of the Consent Order.

It is incredible that the Court completely ignores that fact that the Trial Court, *at the close of Plaintiffs' proofs*, dismissed Paragraph 15 of the Complaint (A1013, Tr. 3022)[4].

Paragraph 15 is the only Paragraph in Count I, the only remaining Count from the original Complaint, of the Complaint that alleges that, "[t]he Order is likely to lead to impairment of wildlife in the Pigeon River Country State Forest including elk, bobcat, and bear."

Therefore, even if this Court holds that the Trial Court erred by dismissing those allegations on the basis that Plaintiffs had failed to establish a prima facie case thereon, it cannot *render* but must *remand* to the Trial Court to afford Defendants an opportunity to proceed to rebut Plaintiffs' prima facie case on those issues.

Defendants/Appellees had a right and a duty to rely upon the ruling of the Trial Court with regard to the issues before it at the time of trial. It is a well recognized general rule that where a Court has considered and determined a point in a case, its conclusion thereon becomes the law of that case, unless or until reversed or modified by an appellate Court[5]. Such a decision, as the law of the case, is binding on the Courts, as well as on the parties, and even though the decision was erroneous, it cannot be availed of by the litigant prejudicially affected. When the Trial Court ruled that the issues regarding impairment to elk or other natural resources were no longer before the Court by dismissing the Paragraphs containing allegations relative thereto, Defendants had a right to rely upon that ruling as the law of

[4] "Paragraph 15, the Court having held earlier that the Order is not likely to lead to anything such as that stated in this allegation but merely provides a mechanism, the same as the original leases, for the permit procedure to go forward and to bring into play the Oil and Gas Act, and therefore this Paragraph may be dismissed."

[5] See CJS, Courts § 195.

the case until such ruling is overturned by an appellate Court.[6]

Again, had the Trial Court not ruled as it did with regard to elk etc., we would have presented evidence to refute those allegations.

C. At The Close Of Plaintiffs' Proofs, The Trial Court Specifically Ruled That The Consent Order, The Validity Of Which Was At Issue, Could Not, As A Matter Of Law, Be Likely To Cause Pollution, Impairment, Or Destruction Of The Air, Water, Or Other Natural Resources Proscribed By The Michigan Environmental Protection Act.

Assuming that the validity of the permits was not at issue, the Complaint seeks review only of the Consent Order as likely to cause pollution, impairment, or destruction of resources. If drilling is the activity which is alleged to cause such damage, then the Consent Order can be said to cause damage only if it gives permission to drill.

Following the close of Plaintiffs' proofs and pursuant to a Motion made by the State Defendants for dismissal of Count IV of the Complaint[7], the Court addressed itself to the Consent Order as a guarantee of drilling.

> [T]he Consent Order itself does not, quote, guarantee, unquote, any oil development, and in that context it is important to note that although the Order says, as is demonstrated by the Complaint, quote, all potential hydrocarbon reservoirs, as indicated by seismic surveys, shall be drilled, developed and produced, it goes on to say, however, quote, under and subject to the terms of the Unit Agreement and the provisions of this Order, unquote, along with

[6] The Supreme Court of this State has recognized that the "law of the case" as a general rule has at least limited application. *Chesnow* v *Nadell*, 330 Mich. 487 at 490.

[7] The Court's ruling dismissing Count IV was not appealed.

> other language. It constitutes a severe strain on the ordinary understanding of the English language and the proper interpretation thereof to say that that is a, quote, guarantee, unquote, that oil drilling and so forth will definitely take effect. The Court would interpret that language to say in the event drilling, development and production is approved, it shall proceed according to the Unit Agreement and the Consent Order; nothing more, nothing less. (A1005-1006; Tr 3014-3015)

Again, the Court specifically *ruled, prior to the time* Defendants were called upon to present proofs, that the Consent Order, the validity of which was before the Court, could not in and of itself be likely to lead to or cause pollution, impairment or destruction proscribed by the Michigan Environmental Protection Act.[8]

It is not clear from the majority opinion, that the Court intended to overrule the Trial Court's specific finding in this regard. The majority recognized that the Consent Order provided that "as many as ten test wells *may* be drilled . . ." (Emphasis added) (p 5). As previously pointed out to the Court (Brief p 16), the plain words of the Consent Order indicate that these wells *may* be drilled, but subject entirely to the provisions of the rules and regulations and the laws of the State of Michigan. There is no basis for the majority's apparent finding that "the issuance of these permits" was "an inevitable consequence of the adoption of the Consent Order." (Majority Opinion p 6) If, in fact, the majority intended such a holding, we suggest that it is erroneous as a matter of law, representing an improper interpretation of the plain language of the Order itself.

But the crucial point is that the Trial Court specifically ruled that as a matter of law the Consent Order was not a

[8] This ruling became the law of the case and was never appealed by Appellants. Appellants are now bound by that ruling and this Court is precluded from considering it *sua sponte*.

guarantee of drilling. This Court, then, reviewing that holding, must apply a "clearly erroneous" standard required by the Court Rules and case law. (See Brief p 18) We submit that the Trial Court's ruling cannot be held to be clearly erroneous and must be allowed to stand.

Finally, if the Consent Order cannot, as Judge Brown held, cause pollution, impairment, or destruction, and its effects are the only questions before the Court (as Judge Brown also held), then any error of the Trial Court with regard to factual findings on the impact of drilling pursuant to the permits is harmless error.

So finding, this Court should *affirm*.

II. PRINCIPLES OF FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW REQUIRE THAT THE COURT REMAND THE CASE TO THE TRIAL COURT FOR FURTHER PROCEEDINGS IN VIEW OF THE COURT'S HOLDINGS WITH REGARD TO THE ISSUES PROPERLY BEFORE THE TRIAL COURT.

There is no similarity between the suit tried before Judge Brown and the case decided by this Court.

The agreement represented by the Consent Order was entered into in June, 1976. Suit was brought in September, 1976, alleging, *inter alia*, that the Consent Order made the granting of permits inevitable. In October, 1976, the Trial Court specifically ruled that it did not.

Following tender of permit applications in January, 1977, the Supervisor of Wells considered the applications for a period of eight months. Public hearings relative to said applications were held during that time, and Plaintiffs/Appellants participated in them.

Prior to trial, Defendants, in good faith, called to the Court's attention that the validity of the permits issued in

August, 1977, had not been properly placed before the Court and requested that Plaintiffs apprise them of the bases for their attack on the validity of the permits if such was to be an issue in the case. Plaintiffs refused, and the Trial Court ruled, at the close of their proofs, that the validity of the permits was not at issue. No relief as to the permits was ever sought until reaching the Supreme Court.

On December 6, 1977, the Trial Court, following eight weeks of trial (contained in over 4,000 pages of transcript), a personal visit to the forest, and consideration of all the evidence, rendered its decision. At that same time, the Trial Court refused to enjoin Defendants from exercising their rights pursuant to the permits, the validity of which was not even before it. The Court of Appeals refused to overrule the Trial Court's decision.

This Court, however, with not even a shred of testimony or any part of the record before it, enjoined the Defendants—even before making a decision as to whether or not it would hear the case at all!!

After the granting of Plaintiff's Application for Leave to Appeal, Plaintiffs submitted a brief which contained a Statement of Facts blatantly in violation of the rules promulgated by this Court. Plaintiffs also therein attempted to raise issues not contained in their Application for Leave to Appeal, clearly in violation of this Court's own rules. Intervening/Defendants Appellees brought a Motion to Strike and sought immediate consideration thereof. No ruling on the Motion has *even yet* been forthcoming.

Finally, all seven members of this Court acknowledge that there was *at least* confusion as to the issues presented by Plaintiffs for adjudication. The majority specifically acknowledges that such confusion was at least partly caused by the Plaintiffs themselves. But that same majority holds that it must be Defendants who are penalized for the confusion, not the Plaintiffs. We have set forth our reasons for this conclusion at length above.

Intervening Defendants/Appellees have been and will continue to be deprived of property without benefit of their constitutionally[9] guaranteed rights to due process of law. Fundamental principles of justice require that, at the very least, the matter be remanded to the Trial Court for proceedings in light of the holdings of the Court.

III. THE COURT ERRED AS A MATTER OF LAW BY HOLDING THAT THE STANDARD OF REVIEW TO BE APPLIED IN THIS CASE REQUIRED BY THE MICHIGAN ENVIRONMENTAL PROTECTION ACT BE DE NOVO, NOTWITHSTANDING CONTRARY PROVISIONS OF THE CONSTITUTION OF THE STATE OF MICHIGAN.

In reversing the Trial Court's refusal to restrain the state from issuing permits to drill for oil and/or gas or from implementing the Consent Order, the Court construed provisions of the Environmental Protection Act ("EPA"), MCLA 691.1201 *et seq*, MSA 14.528(201) *et seq*, to require in actions brought thereunder that the Courts undertake *de novo* review of administrative agency decisions relevant thereto. As so construed, those provisions of the EPA are in violation of the Michigan Constitution.

Article 3, § 2 of the Michigan Constitution provides that "No person exercising powers of one branch shall exercise powers properly belonging to another branch except as *expressly provided in this Constitution.*" (Emphasis added) The Constitution provides for and delineates the scope of review by the judiciary of administrative agency determinations:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses,

[9] U. S. Const.—Amendment V, Amendment XIV § 1
Mich. Const.—Article 1, § 17

> shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.
>
> * * *

Const 1963, art 6, §28. In *Viculin* v *Dep't of Civil Service*, 386 Mich 375 (1971), this Court, by Justice Williams with the concurrence of the entire Court, after thoroughly reviewing the Constitutional Convention Record, expressly held that Article 6, §28 precludes *de novo* review of Civil Service Commission proceedings.[10] *Viculin, supra*, at 384-392. Consistent with the directive in Article 6, §28 that all administrative agencies "existing under the constitution or by law" are subject to the standard of review therein prescribed, the *Viculin* holding, permitting limited review only, has been applied to determinations of administrative agencies other than the Civil Service Commission. See, e.g., *13-Southfield Associates* v *Dep't of Public Health*, 82 Mich App 678 (1978); *Farmers State Bank of Concord* v *Dep't of Commerce*, 77 Mich App 313 (1977), *lv den*, 402 Mich 864 (1978); *Keating Int'l Corp* v *Orion Township*, 51 Mich App 122 (1974); *Union Bank & Trust Co* v *First Michigan Bank & Trust Co*, 44 Mich App 83 (1972). Similarly, the fact that the Department of Natural Resources is an administrative agency "existing . . . by law", that being MCLA 16.350 *et seq*, MSA 3.29(250) *et seq*, the construction accorded Article 6, §28 of the Michigan Constitution in *Viculin, supra*, and the afore-cited progeny thereof preclude, on constitutional grounds, review *de novo* of its determinations by the courts.

[10] An example of constitutionally provided *de novo* review is contained in Art. 5, §29. Clearly the framers contemplated that such a standard should not be applied unless expressly provided by the Constitution.

Accordingly, the Court's construction of provisions of the EPA to require *de novo* review of determinations of the Department of Natural Resources, or any other administrative agency "existing under the constitution or by law", renders those provisions in violation of Article 6, §28 of the Michigan Constitution. That being the case, the familiar rule requiring construction of ambiguous statutory provisions so as to save them, if possible, from unconstitutionality, see, e.g., *Lesniak* v *Fair Employment Practices Comm'n*, 364 Mich 495, 503 (1961), requires the Court to seek an alternative, constitutional construction of the provisions.

The *Lesniak* opinion is particularly relevant to this matter. The Court therein, to save from constitutional attack an express statutory directive that an administrative determination be reviewed *de novo* in circuit court, construed the directive to mean limited review on the administrative record only. *Lesniak, supra*, at 505-506.

Just as in *Lesniak, supra*, there exists in this matter a construction of §4(4) of the EPA that is constitutional. Section 4(4) of the EPA, MCLA 691.1204(4), MSA 14.528(204)(4), the provision construed by the Court to except actions under the EPA from the constitutional limited judicial review standard imposed by the Administrative Procedures Act ("APA"), MCLA 24.201 *et seq*, MSA 3.560(101) *et seq*, on its face does not require the unconstitutional construction accorded it by the Court. Section 4(4) of the EPA nowhere includes an express reference to APA provisions pertaining to the standard of review. Instead, reference is made to APA provisions "pertaining to judicial review". The APA, however, includes provisions pertaining to judicial review other than that prescribing the standard of review thereunder. Section 101 of the APA, MCLA 24.301, MSA 3.560(201), for example, conditions judicial jurisdiction to review final administrative determinations on exhaustion of administrative remedies and conditions judicial jurisdiction to review interlocutory

administrative determinations on even narrower grounds. Furthermore, §104 of the APA, MCLA 24.304, MSA 3.560(204), prescribes a timeliness condition to judicial jurisdiction to review administrative determinations.

Given the inclusion in the APA of judicial review provisions pertaining both to judicial jurisdiction to review administrative determinations and to the standard of review once jurisdictional conditions are satisfied, it is necessary to determine which of those provisions are inapplicable to civil actions under the EPA pursuant to §4(4) thereof. In that regard, if §4(4) of the EPA is construed to prescribe independence only from those APA judicial review provisions pertaining to jurisdiction to review administrative determinations, the statute would survive constitutional attack: since, left subject to the APA limited review standard, the constitutional defect inherent in *de novo* review would be avoided. Moreover, the language employed in §4(4) of the EPA more clearly supports the constitutional construction thereof. While the provision expressly provides for concurrent jurisdiction "notwithstanding the provisions of [of the APA] to the contrary", it nowhere similarly expressly excepts contrary APA judicial review provisions pertaining to standard of review. Certainly, the express reference in the provision only to jurisdiction is the best evidence that, of the APA provisions "pertaining to judicial review", only those pertaining to jurisdiction are thereunder inapplicable to EPA proceedings.

Additionally, a constitutionally sound construction of the EPA is more consistent with §6 thereof, MCLA 691.1206, MSA 14.528(206), providing that actions thereunder are to be "supplementary to existing administrative . . . procedures". A conclusion that §4(4) of the EPA prescribes concurrent jurisdiction notwithstanding contrary APA provisions provides that supplementary procedure. A conclusion that §4(4) prescribes independence from APA provisions pertaining to standard of review, however, supplants rather than supplements existing administrative procedures.

In *State Hwy Comm'n* v *Vanderkloot*, 392 Mich 159 (1974), Justices Williams, Kavanagh, and Swainson agreed that "the EPA [does] not supplant the highway condemnation act judicial review section". In that there appears to be no basis for factually distinguishing *Vanderkloot* (and the impact of the EPA on highway condemnation determinations) from this controversy (and the impact of the EPA on natural resource determinations), there exists also no basis for construing the EPA so as to substitute *de novo* review for the constitutional standard of review of the APA.

Significantly, a constitutional construction of the EPA—that being one that rejects *de novo* review of administrative determinations in EPA proceedings in favor of the limited review on the record mandated by Article 6, §28 of the Michigan Constitution—provides no less environmental protection than does the unconstitutional construction adopted in the Court's opinion. In *State Hwy Comm'n* v *Vanderkloot*, *supra*, at 185-186, this Court made clear that the EPA prescribes substantive environmental guidelines applicable to administrative agency determinations. Certainly, even on review limited to the record as required by Article 6, §28 of the Michigan Constitution, the judiciary can strictly scrutinize compliance with the substantive duties prescribed by the EPA and in that manner assure the protection the environment demands. See *Vanderkloot*, *supra*.

As it stands, the Court's interpretation allows a citizen to go through time-consuming and costly administrative proceedings (preparation of an EIS, hearings, etc.) in order to receive permission from the government of this state to engage in certain activities, and then have a court impose a *completely different standard* for determining the legality of his conduct.

The Court's construction of the provisions of the EPA is constitutionally unsound and results in fundamental unfairness.

RELIEF

Applicants respectfully pray entry by this Court of an Order:

(1) Vacating its opinion and affirming the findings of the Trial Court: or

(2) Vacating its opinion on appeal, directing supplementary briefs be filed on the issues raised in this Motion, and setting the date for the rehearing and oral argument of this appeal on those issues: or

(3) Vacating its order of remand for entry of a permanent injunction prohibiting Intervening Defendants/Appellees' exercise of their rights pursuant ot the permits issued on August 24, 1977, and remanding the matter to the Trial Court for further proceedings consistent with the findings of this Court.

Respectfully submitted,

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By

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Dated: March 12, 1979

APPENDIX C

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 7th day of May in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable MARY S. COLEMAN, Chief Justice.

THOMAS GILES KAVANAUGH, G. MENNEN WILLIAMS, CHARLES L. LEVIN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices.

Rehearing No. 487

WEST MICHIGAN ENVIRONMENTAL ACTION COUNCIL, INC., PIGEON RIVER COUNTRY ASSOCIATION, NORTHLAND SPORTSMAN'S CLUB, DETROIT AUDUBON SOCIETY, INC., MICHIGAN COUNCIL OF TROUT UNLIMITED, INC., MICHIGAN STUDENT ENVIRONMENTAL FOUNDATION, INC., MICHIGAN NATURE ASSOCIATION, INC., EAST MICHIGAN ENVIRONMENTAL ACTION COUNCIL, INC., MICHIGAN LAKES AND STREAMS ASSOCIATION, INC., SIERRA CLUB, INC., *Plaintiffs-Appellants,*

v.

60800
CoA: # 77-4777
LC: # 76-19335-CE

NATURAL RESOURCES COMMISSION OF THE STATE OF MICHIGAN, and HOWARD TANNER as Director of the Department of Natural Resources of Michigan, *Defendants-Appellees,*

and

SHELL OIL COMPANY, a Delaware corporation, AMOCO PRODUCTION COMPANY, a Delaware corporation, and NORTHERN MICHIGAN EXPLORATION COMPANY, a Michigan corporation, *Intervening Defendants-Appellees.*

In this cause a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

STATE OF MICHIGAN—SS.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of May in the year of our Lord one thousand nine hundred and seventy-nine.

/s/ ARLISS R. DAVIS, Deputy Clerk.

APPENDIX D

STATE OF MICHIGAN

IN THE CIRCUIT COURT OF THE COUNTY OF INGHAM

Oral Opinion of the Court Dismissing Complaint and Directing Entry of Final Order in Favor of Defendants and Intervening Defendants.

This is the time set by the Court to render its opinion in regard to this matter. Before doing that, however, the Court would like to express to counsel its thanks for a suit well tried. To use some phraseology from the case, not a stone was left unturned, if you get my drift.

Now, I would just like to characterize briefly counsel for the Plaintiffs. I think he could best be described as doggedly determined. I think relentlessly he pursued his Defendants, frequently putting them to the wall in the presentation of his proofs and the examination of theirs. Counsel for the Defendant Commission, I judge to have presented a very perspicacious defense, using little and gaining greatly through his questions of witnesses. Counsel for the Defendant Shell Oil Company, in my opinion, presented a much more pragmatic approach, relying to a great extent on the exact written word and application of those written principles to the principles of the case.

All in all, I feel this was an enjoyable experience, including our sojourn in the forest, and I confess to having learned a great deal about drilling for oil but perhaps not too much law.

Now, I know that the praise heaped upon counsel will not change anything very much, and it is my judgment that whoever is perceived as having lost here today will, in all likelihood, appeal this decision. I did, however, wish to thank counsel for their indulgence of the Court.

Now, essentially, this suit boils down to the Court's consideration of paragraph 16 of the Complaint, which says, to paraphrase it, that the Defendant Commission had

a duty to determine the likelihood of impairment to natural resources before executing the Consent Order of June 11, 1976, pursuant to the mandates of the Michigan Environmental Proection Act, Section 5, subparagraph 2. The Michigan Environmetal Protection Act, Section 5(2) does provide any alleged pollution, impairment or destruction of the air, water or other natural resources or the public trust therein shall be determined. The Act is silent as to whether this determination shall be in writing or what, but consistent with common sense and the ability to reproduce the determination, it seems logical that the actions of the proceedings would either be in writing, taped or otherwise preserved.

In any event, the Court finds that the Commission did conduct a determination as required by the Michigan Environmental Protection Act, and that determination is in writing, as embodied in the Environmental Impact Statement and incorporated specifically in the Consent Order. The Environmental Impact Statement, which is Defendants' Exhibit 1-A, specifically refers to significant impacts in the event of oil and gas operations in the Pigeon River Country State Forest. To name a few, the elk, bear, bobcat, trees, water, so forth.

The Defendant Commission also determined or was brought to their attention that the water, ground water and surface water could be significantly impacted. It, therefore, ordered the Defendant Shell Oil, et al, to study this feature. As the result, the Dames and Moore report was presented to the Commission for their consideration. A significant portion of this lawsuit has involved the circumstances surrounding this particular report.

The Plaintiffs argue alternatively that pollution, impairment and destruction is implicit in the Environmental Impact Statement, that no evidence has been presented to the contrary to refute this impact, and that, therefore, the State not having by way of affirmative defense cited any

feasible or prudent alternatives, the Court should issue a declaratory judgment, declaring the Commission must make a determination supported by findings as required by the Michigan Environmental Protection Act prior to the entry of Order, or that if the Court determines the Environmental Impact Statement sufficient to constitute a determination by the Michigan Environmental Protection Act, that the Court enjoin permanently the issuance of drilling permits because of the implications in the Environmental Impact Statement of adverse impact.

The Defendant Commission argues that the Commission made its determination pursuant to the Environmental Protection Act, and that finding is incorporated in the Environmental Impact Statement and further was made a part of the Consent Order of June 11, therefore, clearly establishing a compliance with the statute. Defendant Commission argues further that the Plaintiffs have failed to properly present for the Court's consideration any adverse impact for the further application of the Michigan Environmental Protection Act in its Complaint.

One of the most important impediments to proper consideration of this case by the Court has been the inability of the litigants to properly conduct pretrial discovery and the Court to be likewise properly apprised of the situation by way of Motion, Pretrial Hearings, and otherwise, because of the expedited nature of the proceedings, all to the disadvantage of everyone concerned. It is to be noted, however, that the Plaintiffs were given liberal opportunity early in the proceedings to amend their Complaint, to bring to the Court's attention the possible granting of drilling permits. This, the Plaintiffs did not choose to do. Furthermore, the Court did give to the Plaintiff broad opportunity to present its views regarding pollution, impairment or destruction of the air and water. This, perhaps, was too short-sighted a ruling by the Court, but I believe was more clearly occasioned by the nature of the proceedings, the history surrounding the proceedings, and the somewhat truncated Complaint.

Accordingly, the Court feels constrained to rule upon the matter as pled in the Complaint. At this point, we have clearly a divergence, difference of opinion between the parties as to the lawsuit, and it reminds me of a story that's in Dr. Wayne Dyer's book, "Erroneous Zones." It tells an anecdote upon a meeting of Alcoholics Anonymous and the instructor presents a point, has a glass of water and a glass of whisky. He puts a worm in a glass of water, and the worm continues to wiggle around. He puts a worm in the glass of whisky, and it immediately dies. He asks some old sot in the front row, "What does that prove?" And he says, "Well, if you've got worms, drink whisky."

My point is, it's obviously a difference of opinion between counsel here, all depending on one's perception. And of course, the Court must take one of the paths. In any event, to prevent return of the matter for findings of fact in the event of an appeal, in the alternative view of the Plaintiffs, although the Court finds not well pled and with no attempt to amend, but in consideration of the Court's perhaps too liberal policy in giving the Plaintiffs leeway, the Court will speak to the allegations of pollution, impairment and destruction surrounding the air and water. The Court will not consider to any great detail the other impairments advanced, that being the impact upon wildlife, since these allegations mainly concern the application or non-application of the Environmental Impact Statement having a predicate to the determination of the Commission.

Now, in regard to air or its proposed pollution, it is not clear, first of all, whether noise or noise pollution is prohibited by the Michigan Environmental Protection Act as it relates to air as a natural resource. Mr.—I forget the gentleman's name——

Mr. Conner: Bragdon.

The Court: Yes. The Plaintiffs' witness indicated in his opinion that noise pollution is defined as, one, destruction

of the hearing and interference with activity or something that constitutes an annoyance. There was no contention here, I don't believe, that the noise associated with oil and gas operations in the Pigeon River Country State Forest was destructive of hearing, but he did establish that the operation clearly interfered with activity and constituted an annoyance. The facts otherwise indicated that the Plaintiffs had a test conducted in one portion of the forest for the purpose of establishing an ambient noise level to be applied generally in the entire forest. I am not able to give the test great weight and credit, but in the absence of proofs to the contrary, it is held that the proposal of 45 decibels at 1500 feet contemplates a greater noise level at positions closer to the proposed operation and could conceivably interfere with activity and constitute an annoyance.

On the other hand, the proofs do indicate that this noise will be of short duration, a month or less, to give Plaintiffs every possible benefit, and will have no long range impact, and does not, in the opinion of the Court, constitute pollution, impairment or destruction of the air. The noise level indicated and its temporary impact does not, in the opinion of the Court, rise above the present impact of airplanes occasionally flying over the forest and the various firearm seasons, even though it will be continuous in nature as to each one of the sites for the period of the drilling operation. It will not be permanent and is, therefore, of no long-lasting effect.

It should be noted, I believe, that while on our visit in the forest, the Court was directed to deer tracks very close to an operation just south of the forest, certainly circumstantial evidence that deer had visited that site without great concern for the noise emanating from the operation there.

Now, regarding the evidence offered on alleged water pollution, the Court has greater concern. The Plaintiffs produced three witnesses on this point, Mr. Robertson, Mr.

Westlund and Mr. Sheaffer. It is not disputed—to dispose of Mr. Sheaffer's testimony first—that oil in the form of crude, upon reaching the surface water, will have an adverse impact on the aquatic wildlife. What is disputed is the amount and the question of whether, in fact, crude and/or brine will flow from the ground water to the surface water in any quantity. Mr. Westlund believed that an accident involving in the main human error was inevitable and that crude and/or brine was certain to be spilled upon the ground or in some other manner in the drilling operation. Mr. Robertson testified that if crude and/or brine was in some manner spilled, that it was certain to enter the aquifer, flow with the ground water into the surface water, and then, following the implications of Mr. Sheaffer, cause adverse impact. The fatal flaw, it seems to the Court, is that Mr. Westlund failed to establish what quantity of crude and/or brine could reasonably be expected to be produced by an accident, and in the same vein, Mr. Robertson failed to establish the amount of oil and/or brine, lacking Mr. Westlund's foundation, it would take to flow from the accident to the ground water. Certainly a drop, as suggested by counsel for the Defendant Commission, would be insufficient. Applying Mr. Westlund's assertion of common sense, probably a cup or even a gallon or perhaps a barrel would likewise be insignificant. The point is, however, that the Court is left to speculate and hypothecate on the matter without adequate standard or even the benefit of a logical inference.

Accordingly, the Court declines to speculate and believes the testimony to be refuted by other competent and substantial evidence. Defendant Shell Oil produced Mr. Gregg, an expert in the field of hydrology and the principal architect of the Dames and Moore report, which is Plaintiffs' Exhibit 32. It is the observation of the Court, having had the opportunity to judge the credibility of the various witnesses, that this witness is certainly knowledgeable about

the facts and able to comment on them. It is also the observation of the Court that the entity known as Dames and Moore is a careful, prudent and conservative group. The Court is impressed with the background and experience in the field of hydrology. The Court was likewise impressed with the reasoned comments of the witness Gregg on various factors of importance in determining matters surrounding oil operations and the impact of accidents. This witness was able to precisely and concisely define the various correlative factors, such as unconsolidated materials, aquifers, permeability, water tables, gradient, porosity, viscosity and density, ground water level, and so forth, that caused the Court to be convinced, as the tryer of the facts, the witness had an involved understanding of the situation. Furthermore, his experience and knowledge of the Pigeon River Country State Forest, which assisted him and enabled him to apply the various factors, was, to me, of immense assistance.

The Court had some lingering concerns about some certain sites, that being Corwith 1-14 and 1-24, 1-26 and 1-28, which caused the Court to pause before fully acting last Wednesday and Thursday, but those concerns have been resolved by the Court, availing itself of the opportunity to review again the testimony of Mr. Gregg, Mr. Robertson and Mr. Westlund. The Court believes that the greater weight of the evidence lies with the Defendants, in that it is extremely unlikely an accident will occur, and if it does, it appears that the contingency plan, which is Exhibit 33, and the witness' testimony, that contaminants could be removed to the extent of any level specified by the State. There is no reason to believe that the advice of the witness and the protection stipulated to and extracted by the State will be ignored. The Court, simply put, places greater reliance on Mr. Gregg's testimony, the report prepared by him, and the underlying data collected to substantiate his opinions.

It is to be noted that Mr. Robertson, although of considerable knowledge and experience, did not conduct any test of his own but did rely on the Dames and Moore report, rejecting some portions of it, verifying some. The testimony, expertise aside, cannot be given greater weight and credit than that of Mr. Gregg. The Court, therefore, concludes the following: If a brine spill occurs and the emergency measures are resorted to by the Defendant oil company as specified in the Exhibits, then the contaminant will be either entirely removed or removed to an extent specified by the State so as to prevent pollution, impairment or destruction of the surface water. In like manner, a crude oil spill will be confined and appropriately resolved.

Turning then to the adverse impact upon the wildlife; specifically, elk, bear and bobcat, as outlined in the Environmental Impact Statement and as also so graphically described by attorney for the Plaintiffs and Plaintiffs' witness, there appears to be no question that adverse impacts will be visited upon particularly elk, and to some lesser extent, bear and bobcat. It is inevitable. The vital question, however, is it legal impairment or destruction? It is the Court's belief, as suggested by the attorney for the Defendant Commission, that the destruction of the species in the Pigeon River Country State Forest is in no way contemplated. Therefore, that contention is summarily rejected, no proofs having been offered from any quarter of a convincing nature that the State is bent on a program of total elk eradication. It is clear that an adverse impairment of the herd is likely for some unkonwn period to some unknown degree, Plaintiffs' Exhibit 1-A. The Defendant Commission indicates to the Court, and the witness for it indicates, that this is commonly the result of management decisions. Improving deer habitat by cutting trees to allow the sun to shine on the forest floor for the purpose of new growth, it certainly has an adverse impact upon the animals, birds, so forth, using the trees. Eradicating the entire fish population in a lake or stream to destroy unwanted trash species in order to plant more acceptable fish certainly has an adverse impact on the fish killed but is an acceptable management technique.

It is further observed that the forest is immense and contains many areas, both inside and outside the forest, where the elk, bear and bobcat may continue to roam without any apparent adverse effects. Furthermore, the Consent Order guarantees that the other areas of the forest will continue to offer the solitude and quiet demanded by these particular creatures. These animals, along with the trees that will be cut, harvested or otherwise removed, are the innocent victims of the discovery of oil in their forest domain.

Dr. Inman in his testimony aptly describes the situation in terms most compelling. He described the situation involving the trees and animals as part of time dynamics, or a measurement of one period of time and the application of forces to determine its destiny, while, as I understand it, applying the characteristics of the ecosystem. The witness very convincingly presented evidence of the resilience of the forest and its ability to recover. Cutting of trees, for example, was nothing new or unique in the forest, it having experienced many such incidents in the past. The so-called adverse impact matrix, which is page 62 of Exhibit 1-A and pages 42 and 43 of Exhibit 1-A, vividly describes the effect of hydrocarbon development on recreation and other uses within Unit 1 of the Pigeon River Country State Forest.

It would, I believe, be apropos to comment at this point on counsel for the Defendant Commission that the Court should approve of an honest decision honestly arrived at by honest men. This is a little aside, but I had my son down here with me yesterday. To keep him occupied, I had him clean the blackboard there. He did a pretty good job, but he aso put some gook on that table. I tried to help him clean it off, but if we did a bad job and it has polluted,

destroyed or impaired your shirt sleeves, at least the effort was an honest one. Rather, the Court believes the Michigan Environmental Protection Act, applying Ray vs. Mason County Drain and Irish vs. Green—it seems like a contradiction in terms, Irish vs. Green—those cases require a more careful and thoughtful process by the Court. This is not, however, a thicket without guideposts and paths, the cardinal principles being pollution, impairment or destruction.

If the judicial review pinpoints the principle, then, correctly, this conduct cannot be condoned. Merely saying, however, that pollution, impairment or destruction is not imminent is not sufficient. A clear finding of fact is required, and that finding involves a management program which is embodied in a document referred to as the Concept of Management, which is Plaintiffs' Exhibit 2, which the Court had the pleasure of reading in its entirety this past weekend.

Trying to put the finger on the overall picture there presented is exceedingly difficult and perhaps, in the ultimate, a priori reading will involve an honest judgment only. It does, however, seem to the Court that the Defendant Commission wrestled with a difficult problem, and made a difficult, thoughtful judgment. The judgment involved the temporary convenience for some, a long-range usurpage for others. The resource, however, known as hydrocarbons needs to be developed, and the protection of the air, water and wildlife needs to be attended to at the same time.

As I have spoken of earlier in this lawsuit, the Commission has to balance the interest of many diverse groups in its decision. The work, obviously, of the State must go on. Progress, if we want to call it that, must be allowed, and the interests of some must be balanced against the interests of others. Defendant Commission has attended to that duty, the Court believes, and the adverse impact here

described by the evidence would have been greater, more acutely persuasive, had not they acted as they did.

The conduct is therefore approved and is not condemned as pollution, impairment or destruction.

Now, just expanding, then, on the only remaining point the Court believes is in the Complaint, that of the legality of the Consent Order, it is the Court's judgment that a determination was made and that, therefore, the Order was properly entered into. Its determination was described by many witnesses, Mr. Bails, Dr. Inman, Mr. Boushelle, Mr. Kellum, Mr. Swan, Mr. Caveney, so forth, just to mention a few. The main determination is presented in the Environmental Impact Statement, which was prepared under the direction of Dr. Inman, and in it, in the Court's judgment, it presents an accurate descriptive picture of the standards expected in the Act.

The Environmental Impact Statement was incorporated into and made a part of the Consent Order, along with other important documents. This convincingly causes the Court to say that the Defendant Commission has acted properly.

The Plaintiffs argue that the Environmental Impact Statement was not adopted in the regular course of business, as other resolutions have been adopted in the past. The Plaintiff failed to indicate that this Commission ever adopted a rule for such matters, or if a matter of habit and custom, why a deviation from the norm would work a hardship on the Plaintiffs or constitute prejudice. The most important consideration, in the Court's view, is that the Defendant Commission did give effect to the Environmental Impact Statement, relied upon it, and sought to soften its impact, all for the interest of the persons they were appointed to protect. The request, therefore, of the Plaintiff is denied in its entirety. An Order may enter according to the judgment of the Court.

APPENDIX E

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

File No. 76 19335 CE

WEST MICHIGAN ENVIRONMENTAL ACTION COUNCIL, INC., PIGEON RIVER COUNTRY ASSOCIATION, NORTHLAND SPORTSMEN'S CLUB, DETROIT AUDUBON SOCIETY, INC., MICHIGAN COUNCIL OF TROUT UNLIMITED, INC., MICHIGAN STUDENT ENVIRONMENTAL FOUNDATION, INC., MICHIGAN NATURE ASSOCIATION, INC., EAST MICHIGAN ENVIRONMENTAL COUNCIL, INC., MICHIGAN LAKES AND STREAMS ASSOCIATION, INC., *Plaintiffs,*

VS.

NATURAL RESOURCES COMMISSION OF THE STATE OF MICHIGAN, HOWARD TANNER, as Director of the Department of Natural Resources of the State of Michigan, *Defendants,*

and

SHELL OIL COMPANY, a Delaware Corporation, AMOCO PRODUCTION COMPANY, a Delaware Corporation, and NORTHERN MICHIGAN EXPLORATION COMPANY, a Michigan Corporation, *Intervening Defendants.*

FINAL JUDGMENT

In this cause, more than one claim for relief is presented against multiple party defendants.

After the plaintiffs completed the presentation of their evidence to the court, in this action tried without a jury, the defendants, without waiving their right to offer evidence in the event such motion was not granted, moved, pursuant to GCR 504.2, for dismissal of several counts and paragraphs of the complaint on the ground that, upon the facts and the law, the plaintiffs had shown no right to relief. The intervening defendants joined in such motions.

After extensive argument by counsel in open court on the record, and a full review of the evidence presented in eight (8) weeks of trial, the court as trier of the facts, determined the facts and rendered judgment against the plaintiffs.

For the reasons stated by the court in an opinion from the bench, on November 17, 1977, IT IS ADJUDGED AND ORDERED that:

1. Those portions of the complaint, including but not limited to paragraphs 7 and 28, designed to invalidate the hydrocarbon lease agreements entered into by the State of Michigan in 1968 BE, AND THEY HEREBY ARE, DISMISSED.

2. Count V of the complaint, including paragraphs 37 to 42, inclusive, BE, AND IT HEREBY IS, DISMISSED.

3. Count IV of the complaint, including paragraphs 33 to 36, inclusive, BE, AND IT HEREBY IS, DISMISSED.

4. Count II of the complaint, including paragraphs 21 to 29, inclusive, BE, AND IT HEREBY IS, DISMISSED.

5. Paragraphs 5, 13, 14, 15 and 17 BE AND THEY HEREBY ARE, DISMISSED.

II

Further, for the reasons stated by the Court in an opinion from the bench, on November 21, 1977, upon Motion of Defendants and Intervening Defendants, IT IS ADJUDGED AND ORDERED that Count III of the complaint, including paragraphs 30 to 32, inclusive, BE AND IT HEREBY IS DISMISSED pursuant to GCR 504.2.

III

Further, for the reasons stated by the Court in an opinion from the bench, on December 5, 1977, IT IS ORDERED that judgment be and it hereby is entered for the defendants and intervening defendants as to paragraphs 1, 2, 3,

4, 6, 8, 9, 10, 11, 12, 16, 18, 19, and 20 of the complaint, which dismisses, with prejudice, all of plaintiffs' claims for relief.

IV

Further, IT IS ORDERED that judgment be and it hereby is entered for defendants and intervening defendants and against the plaintiffs as to every claim arising out of the transactions and occurrences which are the subject matter of the action, and which were, or might have been, actually litigated. This paragraph is intended to be consistent with the provisions of the General Court Rules.

V

Further, for the reasons stated by the Court in an opinion from the bench, on November 21, 1977, the following plaintiffs, to wit: Northland Sportsman's Club, Thunder Bay Audubon Society, Michigan Nature Association, Inc., and Michigan Chapter, Sierra Club, Inc., are dismissed from the cause.

VI

Costs are awarded to intervening defendants by further order of the Court.

This final judgment entered at Lansing, Michigan, on December 5th, 1977.

/s/ THOMAS BROWN
The Honorable Thomas Brown
Circuit Judge